No. 19-1004

IN THE

Supreme Court of the United States

IN RE TUMBLING DICE, INC. ET AL., DEBTORS,

TUMBLING DICE, INC. ET AL.,
Petitioner,

v.

UNDER MY THUMB, INC.,
Respondent.

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

BRIEF FOR THE RESPONDENT

TEAM NUMBER 5
COUNSEL FOR RESPONDENT

JANUARY 21, 2020

QUESTIONS PRESENTED

I. Under 11 U.S.C. § 365(c)(1), is a debtor in possession permitted to assume an executory contract over the objection of the non-debtor party when the contract would then be assignable to a third party but applicable non-bankruptcy law excuses the non-debtor party from accepting performance from or rendering performance to any entity other than the debtor or the debtor in possession?

II. Under 11 U.S.C. § 1129(a)(10), when a proposed joint, multi-debtor plan is discernibly more detrimental to a particular impaired class of claims than to any other class of claims, is acceptance of the plan required from at least one impaired class of claims of each debtor or from only one impaired class of claims of a single debtor?

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OPINIONS BELOW

The Thirteenth Circuit Court of Appeals' decision is available at No. 18-0805 and reprinted at Record 2. Both the bankruptcy court and Bankruptcy Appellate Panel for the Thirteenth Circuit decided in favor of Tumbling Dice, Inc. and its affiliated debtors. On appeal, the United States Court of Appeals for the Thirteenth Circuit reversed in favor of Under My Thumb, Inc..

STATEMENT OF JURISDICTION

The formal statement of jurisdiction is waived pursuant to Competition Rule VIII.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

This action implicates statutory construction of certain provisions of Title 11 of the United States Code. There is a further balance in reading the language of the code and recognizing its relevance to related Constitutional provisions. The following are also restated in the Appendix.

Article 1, Section 8, clause 8 of the United States Constitution provides:

> The Congress shall have power to…To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

The relevant portion of 11 U.S.C. § 365(c)(1) provides:

> **(c)** The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if--
>
> > **(1)(A)** applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and
> > **(B)** such party does not consent to such assumption or assignment;

The relevant portion of 11 U.S.C. § 1129 provides:

> (a) The court shall confirm a plan only if all of the following requirements are met:
>
> > (10) If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.

STATEMENT OF THE CASE

This appeal arises out of Petitioner's attempt to sidestep the procedural requirements of the Bankruptcy Code. As a result, the bankruptcy proceeding underlying this appeal threatens to jeopardize the integrity and value of Respondent's intellectual property rights.

I. FACTUAL HISTORY

A. Under My Thumb successfully develops and licenses a customer loyalty software program to Development.

Petitioner Tumbling Dice, Inc. is a holding company formed to own the membership interest of nine wholly-owned subsidiaries. R. at 4. Petitioner and its subsidiaries (the "Debtors") own and operate casinos and resorts located across the United States. R. at 2-3. Respondent Under My Thumb, Inc. ("Under My Thumb") is a prominent software development corporation that specializes in creating software for managing customer loyalty programs. R. at 4.

In 2008, the Debtors hired Under My Thumb to create a personalized, integrated software system (the "Software") to modernize the Debtors' loyalty program, Club Satisfaction. R. at 4. One of Petitioner's subsidiaries, Tumbling Dice Development, LLC ("Development") was created for the sole purpose of acting as the licensee under the software license agreement. R. at 4. Under My Thumb incurred $10 million in costs to create the Software, only $7 million of which Development reimbursed pursuant to an unsecured promissory note (the "R&D Note"). R. at 4.

Under My Thumb and Development entered into a non-exclusive license agreement (the "Agreement") which expressly prohibited the Debtors from assigning or subleasing the license without written consent from Under My Thumb. R. at 5. Under My Thumb was to receive a monthly licensing fee which would allow Under My Thumb to recuperate the remaining $3 million in development costs. R. at 5. Only after the development costs were recovered would Under My Thumb make a profit from the Agreement with the Debtors.

Under My Thumb's patented software was so successful that, within a short period of time, membership in Club Satisfaction tripled and spending by members increased significantly. R. at 5. The Software was a crucial part of the Debtors' business success. R. at 5. Furthermore, the Debtors admit that their business model depended heavily on the Software. R. at 5.

B. The Debtors encounter financial problems and file for Chapter 11 bankruptcy.

In 2011, a hedge fund, Start Me Up, Inc., acquired Tumbling Dice, Inc.'s stock through a leveraged buyout. R. at 6. To complete the buyout, the Debtors received a $3 billion loan from a group of lenders (the "Lenders"), and in return the Lenders were given first-priority liens on the Debtors' assets. R. at 6.

In June 2015, the Debtors abruptly stopped making payments on the R&D Note, under which Under My Thumb was still owed more than $6 million. R at 6. Additionally, the Debtors became unable to pay the remaining $2.8 billion owed to the Lenders and, as a result, filed for Chapter 11 bankruptcy in January 2016 to refinance or restructure the debt. R. at 6.

After lengthy negotiations, the Debtors announced that a joint plan (the "Plan") had been agreed upon by the Debtors and their various creditors. R. at 7. The Plan expressly indicated that it was a joint plan and not intended to substantively consolidate the Debtor's estates. R. at 7. Start Me Up, Inc. retained its equity interest in the Debtors and, in exchange, funded a 55% distribution to the Debtors' unsecured creditors, including Under My Thumb. R. at 7. The Plan also proposed to assume the license agreement between the Debtors and Under My Thumb under sections 365 and 1123(b)(2) of the Bankruptcy Code. R. at 7.

C. The proposed Chapter 11 plan allows a direct competitor of Under My Thumb to fund the plan and gain a controlling majority of the Debtors' operations.

The Plan quickly became problematic when Under My Thumb learned that a private equity group, Sympathy for the Devil, LP ("Sympathy for the Devil") would fund $35 million of the

unsecured distribution in exchange for 51% of the voting shares of Tumbling Dice, Inc.. Sympathy for the Devil's portfolio of companies includes a direct competitor of Under My Thumb who has aggressively attempted to replicate the software that was licensed to the Debtors. R. at 8. Under My Thumb was understandably concerned about the Plan since it would give the competitor easy access to the licensed software. R. at 8.

II. PROCEDURAL HISTORY

The bankruptcy court and the Bankruptcy Appellate Panel for the Thirteenth Circuit ruled in favor of the Debtors on both issues. R. at 3. On appeal, a three-judge panel from the Court of Appeals for the Thirteenth Circuit reversed and ruled in favor of Under My Thumb, holding that (1) section 365(c)(1) precludes assumption of a non-exclusive license of intellectual property over the objection of the licensor, and (2) section 1129(a)(10) requires acceptance from an impaired class of claims of each debtor under a joint, multi-debtor plan. R. at 3.

STANDARD OF REVIEW

The questions presented are based on statutory interpretation of the Bankruptcy Code[1] and, as such, are pure issues of law. Therefore, the standard of review for this appeal is de novo. *Texas v. Soileau (In re Soileau)*, 488 F.3d 302, 305 (5th Cir. 2007).

SUMMARY OF THE ARGUMENT

The Bankruptcy Code provides the playbook for both creditors and debtors during a restructuring process. The goal is simple: provide a foundation that facilitates a successful reorganization without entirely violating the rights of creditors. Notably, Congress recognized the need to occasionally balance the playing field for the benefit of the creditors. In two instances, the

[1] The Bankruptcy Code is set forth in 11 U.S.C. §§ 101 *et seq.* Specific sections of the Bankruptcy Code are identified herein as "section __."

Legislature plainly creates necessary protections for creditors facing a potential loss of intellectual property rights and voting power in a cramdown proceeding.

The Constitution holds intellectual property creators in high regard, empowering Congress to necessarily reward such creators with exclusive rights to their creations and discoveries. Both the Bankruptcy Code and federal common law encompass this reward and its inherent protection. Section 365 of the Bankruptcy Code bars assumption when applicable law would bar an assignment.[2] The parties acknowledge that the referenced applicable law refers to intellectual property law which federal common law deems personal and nondelegable. R. at 13. Therefore, the Agreement cannot be assigned and the plain language of section 365(c)(1) precludes assumption of the Agreement.

Debtors' attempts to infringe on licensors' exclusive rights and assume valuable intellectual property executory contracts have created a stir among the bankruptcy courts and circuits. A majority of the circuit courts read the statute as plainly written and correctly apply what is commonly known as the "Hypothetical Test." The Hypothetical Test asks a simple question: would the debtor hypothetically be able to assign the executory contract under applicable law? If the answer is yes, then the debtor may assume the contract and do as it pleases. If, however, the debtor is unable to hypothetically assign the executory contract under applicable law, the debtor is precluded from assuming the contract in the first place. This case presents the latter result. On the contrary, some courts have errantly adopted the "Actual Test" and replaced words in the statute to favor debtors. The Actual Test asks whether the debtor actually intends to assign the contract. If the debtor does not intend to assign the contract, it may assume the executory contract.

[2] Subsection (c)(1) only bars assumption if the non-debtor licensor does not provide consent. Under My Thumb does not consent. Thus, Development may not assume the executory contract.

This Court could not be clearer: statutes should be read the way they are written as the selected words express the intent of Congress. When the language is plain and clear, the judicial inquiry is over, subject to rare exceptions that do not apply in this case. Courts should not venture into legislative history or policy rationales as a means to change a statute when the language is plainly written. Section 365, in its entirety, plainly conveys this Court's responsibility to apply the Hypothetical Test and adhere to the language of the statute.

Application of the Hypothetical Test also balances the competing intellectual property and bankruptcy policies at hand. The plain language of the statute gives credence to both the licensor's continued right to exclusivity, while similarly recognizing the importance of facilitating a successful reorganization. Section 365 supports the evolution and economic shift of the market from an industrial-based economy to a knowledge-based economy by providing non-debtor patent holders with an equitable protection in the face of a licensee's bankruptcy. Indeed, the statute provides protections to the non-debtor as both a licensor and licensee. The statute is clear. Intellectual property creators deserve certain safeguards and their interests should not be automatically subordinated to the interests of the debtor. As this Court frequently reiterates, the plain language is applied and the judicial inquiry is complete.

Regarding the second issue presented to this Court, the Thirteenth Circuit rightfully adopted the *per debtor* interpretation of section 1129(a)(10) of Title 11. The *per debtor* interpretation of the statute requires a plan of reorganization to obtain acceptance from at least one impaired class of creditors of *each debtor*. On the other hand, the *per plan* interpretation merely requires the approval of a single impaired class of creditors *per plan*.

This Court should affirm the decision of the Thirteenth Circuit to adopt the *per debtor* interpretation for two reasons. First, statutory construction guidelines noticeably support the *per*

debtor interpretation. Second, important public policy considerations and prescribed purposes of the Bankruptcy Code may only be upheld through application of the *per debtor* approach.

Two preeminent rules of statutory construction directly promote adopting a *per debtor* interpretation of section 1129(a)(10). Most pertinent to this issue is the fact that Congress expressly imposed the general rule that under the Bankruptcy Code, the singular includes the plural. Although written with the singular noun "plan," the plural reading of section 1129(a)(10) only supports the *per debtor* interpretation. This is because requiring each debtor to receive approval of a reorganization plan from at least one of its impaired creditors is consistent with the notion that, absent substantive consolidation, each debtor's estate is tied to a distinct plan. The *per plan* approach relies on the erroneous belief that a joint plan is a single plan that governs multiple debtors. In reality, a joint plan is a multitude of plans administered through a single docket.

Furthermore, the well-known canon of construction that a statute should be read and interpreted as a whole only logically permits the *per debtor* interpretation of each subsection of section 1129(a). To interpret the statute otherwise would allow debtors to avoid compliance with the Bankruptcy Code and would empower debtors to submit plans in bad faith during joint administration. The *per debtor* approach prohibits ill-intentioned debtors from abusing these loopholes in the subsections of section 1129(a).

The *per plan* approach also paves the way to other loopholes in the Bankruptcy Code. By ignoring the fundamental differences between joint administration and substantive consolidation, the per plan approach blurs the line between these two inherently distinct concepts and leads to "de facto substantive consolidation." Despite all of the safeguards Congress put in place to constrain the use of substantive consolidation, the *per plan* approach permits debtors to completely bypass these defenses and exploit this equitable remedy to their advantage.

Finally, adopting the *per debtor* interpretation of section 1129(a)(10) is the only way to ensure equitable application of the statute in all situations. When looking from the outside, it may seem unfair to allow a single creditor to reject a plan for reorganization. It is equally unfair, however, to allow a single debtor-friendly creditor to force a damning plan on all other creditors whose rights are already impaired by bankruptcy proceedings. The *per debtor* interpretation of section 1129(a)(10) requires that courts leave the loss where it lies in such situations. But the *per plan* interpretation only promotes the latter situation and inflicts a great injustice upon equity.

ARGUMENT

This Court should affirm the Thirteenth Circuit Court of Appeals' decision to apply the Hypothetical Test in cases depending upon 11 U.S.C. § 365(c)(1). This Court should further affirm the circuit court's decision to adopt the *per debtor* interpretation of 11 U.S.C. § 1129(a)(10).

I. THE THIRTEENTH CIRCUIT CORRECTLY ADOPTED AND APPLIED THE "HYPOTHETICAL TEST" WHICH IMPEDES ASSUMPTION OF THE NON-EXCLUSIVE LICENSE OF INTELLECTUAL PROPERTY WITHOUT THE LICENSOR'S CONSENT.

When intellectual property and bankruptcy laws cross paths in a Chapter 11 proceeding, the unique intersection presents an issue of whether a debtor-licensee may assume its licensing agreement without the licensor's consent. Courts are curiously split on this issue, applying either the statutorily supported Hypothetical Test, or misguided Actual Test. The Thirteenth Circuit correctly adopted the Hypothetical Test and properly applied it according to the statutory text.

Section 365 empowers a debtor in possession to assume executory contracts held by the debtor prepetition. 11 U.S.C. § 365(a). The Bankruptcy Code does not define "executory contract," but it is often subject to the "Countryman" definition, which defines an executory contract in bankruptcy proceedings as a contract under which "the obligation of both the bankrupt and the other party are so far unperformed that the failure of either to complete performance would

constitute a material breach excusing performance of the other." *Olah v. Baird (In re Baird)*, 567 F.3d 1207, 1211 (10th Cir. 2009). Because of the ongoing obligations by Under My Thumb and Development, the Agreement is an executory contract and subject to the command of section 365(c)(1). R. at 5.

A. The plain meaning of 11 U.S.C. § 365(c)(1) unambiguously dictates application of the Hypothetical Test, which precludes assumption of a non-exclusive license absent the licensor's consent.

Section 365(c)(1) of title 11 of the United States Code provides unambiguous language that prohibits a software licensee from assuming a license agreement without the licensor's consent. Congress articulated the statute in the disjunctive which, by its plain language, prohibits a licensee from "assuming or assigning," rather than "assuming and assigning," the Agreement. Specifically, the Hypothetical Test adheres to the disjunctive language of the statute ("or"), while the Actual Test effectively replaces "or" with "and." In whole, the statute reads:

> (c) The trustee may not assume *or* assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—
>
> (1)(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and
>
> (B) such party does not consent to such assumption *or* assignment.

11 U.S.C. § 365(c)(1) (emphasis added).

Here, the applicable law that excuses a party from accepting performance from an entity other than the debtor or debtor in possession is federal intellectual property law. R. at 12. The parties agree—federal common law defines a patent license as personal to the licensee, precluding

assignment absent the consent of the licensor.[3] And without the licensor's consent, section 365(c)(1) prohibits a software licensee from assuming a license agreement. Therefore, Development cannot assume the Agreement without Under My Thumb's consent.

By applying the statute to the facts, the Legislature plainly states: *Development* may not assume *the Agreement* because *federal intellectual property law* excuses *Under My Thumb* from accepting performance from or rendering performance to an entity other than *Development*, and *Under My Thumb* does not consent to such assumption. Such a straightforward reading of the statute, which lacks ambiguity, lends itself to the "Plain Meaning Rule." *Lamie v. United States Tr.*, 540 U.S. 526, 527 (2004). This Court has repeatedly reiterated the function of the Plain Meaning Rule, including the finality of its operation subject to rare exceptions. *E.g.*, *Id.* ("The starting point in discerning congressional intent, however, is the existing statutory text…"); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (courts begin with the understanding that Congress expresses its intent via the words in the statute); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (Congress "says in a statute what it means and means in a statute what it says"); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (when the language of the statute is plain, the judicial inquiry ends and the court should simply apply the words as written); *New Lamp Chimney Co. v. Ansonia Brass & Copper Co.*, 91 U.S. 656, 663 (1875) (the intent of the legislature must be collected from the words of the act itself).

Over a century of repeated verbiage demonstrates that this Court leaves no doubt what outcome follows unambiguous statutory language: "[C]ourts are bound to seek for the intention of the legislature in the words of the act itself, and they are not at liberty to suppose that the legislature

[3] The parties stipulated that the Agreement was non-assignable because, under applicable non-bankruptcy law, Under My Thumb was excused from rendering performance to an entity other than Development and its affiliates." R. at 8, n.7.

intended any thing different from what their language imports." *New Lamp Chimney Co.*, 91 U.S. at 663. More recently, this Court articulated where "the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *Ron Pair Enters.*, 489 U.S. at 241; *see also Hartford Underwriters Ins. Co.*, 530 U.S. at 6 (Congress 'says in a statute what it means and means in a statute what it says there') (quoting *Conn. Nat'l Bank*, 503 U.S. at 254). Consequently, when the words of the statute are plain and clear, as they are here, a court has no need to inquire beyond the plain meaning of the statute. *Ron Pair Enters.*, 489 U.S. at 240–241.

In fact, the starting point in discerning congressional intent is the existing statutory text. *Lamie*, 540 U.S. at 527. Furthermore, the plain meaning of the legislation should be conclusive, stopping any further interpretations or readings of the statute. *Ron Pair Enters.*, 489 U.S. at 242. Resolution of a dispute over the meaning of a statute begins with the language of the statute itself. *Id.* at 241; *see also Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985). In cases such as the one presently before this Court where the language of the statute is plain, the construction inquiry should end and the courts should enforce the statute according to its terms. *Ron Pair Enters.*, 489 U.S. at 241; *see also Caminetti v. United States*, 242 U.S. 470, 485 (1917). "The plain text of the Bankruptcy Code begins and ends our analysis." *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016).

1. A debtor in possession performs similar functions to a trustee and the terms are essentially interchangeable.

In a Chapter 11 proceeding, the Bankruptcy Code affords an insolvent debtor the ability to assume the role of debtor in possession. 11 U.S.C. § 1101. "Subject to any limitations on a trustee serving in a case under this chapter … a debtor in possession shall have all the rights … and powers, and shall perform all the functions and duties … of a trustee serving in a case under this chapter." 11 U.S.C. § 1107(a). Thus, it follows that "[t]he terms 'trustee' and 'debtor in

possession,' as used in the Bankruptcy Code, are … essentially interchangeable." *Official Comm. Of Unsecured Creditors of Cybergenics Corp. v. Chinery (In re Cybergenics Corp.)*, 226 F.3d 237, 243 (3d Cir. 2000). The legislative history further supports the statutory language.

> This section places a debtor in possession in the shoes of a trustee in every way. The debtor is given the rights and powers of a chapter 11 trustee. He is required to perform the functions and duties of a chapter 11 trustee…. He is also subject to any limitations on a chapter 11 trustee….

S. Rep. No. 95-989, at 116 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5902.

Section 365 empowers both trustees and debtors in possession to assume executory contracts. 11 U.S.C. § 365(a). In both subsection (a) and (c), the statute simply states "trustee," but refers to both trustee and debtors in possession as directed by the chapter 11 provisions of the code. *See* 11 U.S.C. § § 1106 and 1107. In a supreme display of irony, supporters of the Actual Test contend that this Court should treat "trustee" and "debtor in possession" as meaning two different things within section 365. In other words, for the benefit of the debtor, "trustee" should only be read as "trustee" in subsection (c) but must be read as "trustee" or "debtor in possession" for subsection (a). Otherwise, proponents of the Actual Test would present a moot point because the debtor in possession would never have the power to assume an executory contract in the first place. Thus, the Bankruptcy Code allows a trustee (or debtor in possession) to assume executory contracts, but a trustee (or debtor in possession) may not assume *or* assign any executory contract if other applicable law forbids it. 11 U.S.C. § § 365(a) and (c) .

2. Because the debtor in possession and debtor are separate entities, any assumption of an intellectual property executory contract simultaneously constitutes an assignment.

Licensors are afforded the right to exclude and control the identity of their patent licensees. *See Everex Sys., Inc. v. Cadtrak Corp. (In re CFLC, Inc.)*, 89 F.3d 673, 679–80 (9th Cir. 1996) (noting the policy concern that the patent holder has the ability to control the identity of licensees

and holding that nonexclusive patent licenses are not assignable). A debtor licensee that seeks to assume an intellectual property based executory contract during the bankruptcy process violates the licensor's rights because the bankruptcy estate is a separate legal entity from the debtor. 11 U.S.C. § 541(a). Thus, when the debtor in possession, or more broadly put—the bankruptcy estate—assumes a patent licensing agreement, the debtor licensee is effectively assigning the license to the estate.

The automatic assignment presents a serious issue for the nondebtor licensor: "the patent license is no longer held by the same legal entity as it was prebankruptcy." Jennifer Ying, *Comment: The Plain Meaning of Section 365(c): The Tension Between Bankruptcy and Patent Law in Patent Licensing*, 158 U. Pa. L. Rev. 1225, 1240 (2010). "Furthermore, even assuming that the patent license was still held by the same prepetition 'entity,' the same right-to-control problems would arise once the debtor-licensee tried to sell the license to a third party as part of its restructuring or reorganization plan under Chapter 11." *Id.* at 1240–41.

Even if this Court determines that the debtor in possession is not a new legal entity, the plain language of the statute provides a simple analysis. "Or" means "or" which frames the analysis with one simple question. Could the other party to the contract refuse, under applicable federal patent law, to accept performance from a third party? Under My Thumb can, so Development may not assume the Agreement. The status of the debtor may even be irrelevant, just as other inquiries beyond the meaning of "or" are irrelevant and attempt to justify erroneous results.

B. Because the language of 365(c)(1) is clear with its use of "or," no other interpretations or resources are relevant or meritorious.

Undoubtedly, legislative history often accompanies adaptations and modernizations of certain laws, including the bankruptcy laws. *See Ron Pair Enters.*, 489 U.S. at 240. Congress is not expected to explain with particularity each step that it takes, but, even if it does, the additional

information is likely irrelevant. *Id.* "As long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute." *Id.* at 240–41.

In the case at hand, section 365(c)(1) uses the disjunctive "or." 11 U.S.C. § 365(c)(1). Because the language is clear, legislative history is irrelevant, regardless of whether it supports or negates the plain language of the statute. *Ron Pair Enters.*, 489 U.S. at 241. Instead, the plain language of section 365(c)(1) is the ultimate expression of Congress' intent—that Development cannot assign the Agreement under other applicable law and thus, section 365(c)(1) disallows assumption of the Agreement ab initio. *Id.*

Even if legislative history were applicable, it would favor application of the Plain Meaning Rule. Section 365, as it now reads, was enacted in the 1984 Act. *RCI Tech. Corp. v. Sunterra Corp. (In re Sunterra Corp.*), 361 F.3d 257, 270 (4th Cir. 2004). No relevant legislative history exists for the 1984 Act. *Id.* The only relevant documented legislative history was a "relatively obscure committee report." *Perlman v. Catapult Entm't, Inc. (In re Catapult Entm't, Inc.*), 165 F.3d 747, 754 (9th Cir. 1999).[4] Such legislative history is not conclusive on congressional intent, nor worthy of trumping contrary plain language in the statute for three reasons. *In re Sunterra Corp.*¸ 361 F.3d at 270. "First, the 1980 Report relates to a 1980 proposal, which was never enacted, rather than to the 1984 Act; and we have held that courts are not free to replace a statute's plain meaning with 'unenacted legislative intent.'" *Id.* (citing *United States v. Morison*, 844 F.2d 1057, 1064 (4th Cir.

[4] The committee report to the 1980 amendment states, "This amendment makes it clear that the prohibition against a trustee's power to assume an executory contract does not apply where it is the debtor that is in possession and the performance to be given or received under a personal service contract will be the same as if no petition had been filed because of the personal nature of the contract." H.R. 1195, 96th Cong., 2d Sess. § 27(b) (1980) (the "1980 Report").

1988)). Next, the referenced legislative history came several years prior to the enactment of the 1984 Act. Last, it only reflects the views of a single House committee. *Id.*

More importantly, even with notice of the split among the circuits regarding interpretation of section 365(c)(1), Congress intentionally elected to keep "or" in the statute during the overhaul of the Bankruptcy Code. *See Apex Hosiery Co. v. Leader*, 310 U.S. 469, 488 (1940) ("The long time failure of Congress to alter the Act after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one."). When the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) was enacted in 2005, a majority of circuits that have encountered this issue had already adopted the Hypothetical Test. *See, e.g., In re W. Elecs., Inc.*, 852 F.2d 79, 83 (3d Cir. 1988); *In re Sunterra Corp*., 361 F.3d at 271 (4th Cir. 2004); *In re Catapult Entm't, Inc*., 165 F.3d at 750 (9th Cir. 1999); *City of Jamestown v. James Cable Partners, L.P. (In re James Cable Partners)*, 27 F.3d 534, 537 (11th Cir. 1994) (per curiam).[5] Congress' awareness and nonresponse support a presumption of legislative awareness and intention to favor the plain meaning approach and Hypothetical Test. *See Apex Hosiery*, 310 U.S. at 488.

Even common practice prior to legislation is irrelevant in the face of a plain reading of the statute. *Hartford Underwriters Ins. Co.*, 530 U.S. at 10. "It is a tool of construction, not an extratextual supplement." *Id.* It is only applied when provisions, unlike 365(c)(1), are subject to interpretation or are ambiguous. *Id.* "[W]here the meaning of the Bankruptcy Code's text is itself

[5] *In re James Cable Partners* applied the Hypothetical Test to interpret section 365(c)(1) but ultimately decided the debtor in possession could assume the contract because no other applicable law prevented assignment of the franchise agreement.

clear … its operation is unimpeded by contrary … prior practice." *Id.* (quoting *BFP v. Resolution Tr. Corp.*, 511 U.S. 531, 546 (1994) (internal quotation marks omitted)).

This Court further avoids deviating from the plain meaning of a statute when the text is "awkward, and even ungrammatical." *Lamie*, 540 U.S. at 534. Grammatical errors or a lack of grammatical soundness do not necessarily create an ambiguity and give rise to additional canons of construction. *See id.* Therefore, adding words, deleting words, or exchanging words to follow sound grammatical principles or further a policy violates the first rule of statutory interpretation: the Plain Meaning Rule. *See id.*

1. Adherence to the Plain Meaning Rule evades surplusage, even though the plain meaning would nonetheless control in constructing the statute.

A plain reading of 365(c)(1) also renders each section of the statute operable, eliminating any need to address surplusage. Even though the canon to avoid surplusage construction is not absolute, its use in section 365 is unnecessary. *See id.* at 536. At first glance, the interplay between section 365(c)(1) and section 365(f)(1) may create confusion, but it is quickly resolved as each subsection is analyzed within the appropriate context.

Section 365(f)(1) provides a broad rule: "a law that, as a general matter, 'prohibits, restricts, or conditions the assignment' of executory contracts is trumped by the provisions of subsection (f)(1)." *In re Catapult Entm't, Inc.*, 165 F.3d at 752 (citing *In re James Cable Partners, L.P.*, 27 F.3d at 538; *In re Magness*, 972 F.2d 689, 695 (6th Cir. 1992)). Section 365(c)(1) then carefully carves out an exception to the broad rule: applicable law specifically "excuses a party … from accepting performance from or rendering performance to an entity different from the one with which the party originally contracted." *Id.* at 752. Consequently, section 365(c)(1) is a recognized exception to the broad rule in section 365(f). *In re Sunterra Corp.*, 361 F.3d at 266. Both provisions utilize the term "applicable law" but in a markedly different scope. *Id.*; *see also In re Magness*,

972 F.2d at 695. Thus, all of the provisions within section 365 are operable under a plain reading of the statute and no surplusage exists.

Even if a plain reading of the statute created unavoidable surplusage, the pending result is still not controlling. *Lamie*, 540 U.S. at 536. "Surplusage does not always produce ambiguity and our preference for avoiding surplusage constructions is not absolute." *Id.* A plain reading that creates surplusage ("or" means "or" and (f)(1) is superfluous) still controls in the face of a contrary reading that eliminates surplusage but creates an ambiguity ("or" means "and" and (f)(1) is read along with (c)(1)). *Id.* Applying the rule against surplusage is inappropriate when it violates the plain reading of a statute. *Id.* This Court "should prefer the plain meaning since that approach respects the words of Congress." *Id.* "In this manner, [this Court] avoid[s] the pitfalls that plague too quick a turn to the more controversial realm of legislative history." *Id.* Out of respect for Congress, the Hypothetical Test applies the plain meaning of the statute, while the Actual Test engages in the pitfalls consequent to deviation from the statute's plain meaning.

2. The plain meaning of section 365(c)(1) produces a rational result to synthesize and resolve the competing interests between intellectual property and bankruptcy laws.

By plainly reading section 365(c)(1) and recognizing its role as a carve-out of section 365(f)(1), this Court will ease the deep-rooted tension[6] between intellectual property laws and bankruptcy law. Any reading to the contrary will create a deeper divide and propel the interests of the bankruptcy estate at the expense of all intellectual property creators.

[6] The unresolved tension is palpable. "Intellectual property law is premised on the power of an owner or creator to exclude others from the use of a patent or copyright (the 'monopoly power')." David R. Kuney, Article, *Restructuring Dilemmas for the High Technology Licensee: Will "Plain Meaning" Bring Order to the Chaotic Bankruptcy Law for Assumption and Assignment of Technology Licenses?*, 44 Gonz. L. Rev. 123, 124 (2008/2009). Debtors, however, argue the "principle that property should be freely assignable, which is intrinsic to restructuring under U.S. bankruptcy law." *Id.*

Any party opposing a natural reading of 365(c)(1) by replacing "or" with "and" bears an "exceptionally heavy" burden to deviate from the plain meaning of the statute. *Hartford Underwriters Ins. Co.*, 530 U.S. at 9. "The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters,'" commonly referred to as an absurd result. *Ron Pair Enters., Inc.*, 489 U.S. at 242 (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)). It is only in these rare cases when the intention of the drafters controls, instead of the strict language. *Id.* For this Court to "justify a departure from the letter of the law … the absurdity must be so gross as to shock the general moral or common sense." *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930).

a. Congress' deference to a policy that contends with general bankruptcy goals does not produce an absurd result.

The contention is straightforward. Either bankruptcy law will occasionally take a back seat to federal common law when the Hypothetical Test is applied, or the rights of intellectual property holders will be obliterated by bankruptcy law via the Actual Test. Having a winner and a loser is rather typical—and certainly not an absurd result. In fact, despite general bankruptcy laws' goal to further the chances of a successful reorganization, the Bankruptcy Code contains many provisions preserving the rights of non-debtor parties. *See, e.g.*, 11 U.S.C. § 362(b) (listing various exceptions to the automatic stay); 11 U.S.C. § 510 (honoring and enforcing subordination agreements); 11 U.S.C. § 1121 (limiting the duration of a debtor's exclusive right to propose a plan); 11 U.S.C. § 1129 (ensuring at least one impaired creditor approves a plan of reorganization). "Congress did not sacrifice every right of a nondebtor party to the reorganization process, and … courts should not assume that sections of the Bankruptcy Code unfavorable to the debtor were enacted in error." *In re Sunterra Corp.*, 361 F.3d at 268 (internal quotations omitted).

b. The plain language of section 365 actually resolves the competing policies of intellectual property and bankruptcy law.

As previously noted, federal intellectual property law protects the rights of licensors to maintain exclusive control. General bankruptcy policies intend to foster a successful reorganization and maximize the value of the debtor's assets. R. at 14. If the policies were competing on equal footing, would one outweigh the other? Perhaps. But this Court need not determine that issue. The Legislature has already answered how to synthesize the two policies. *See* 11 U.S.C. § 365(c)(1). Non-debtor licensors are afforded their same protections during a bankruptcy proceeding: "a debtor in possession may not assume an executory contract over the nondebtor's objection if applicable law would bar assignment to a hypothetical third party." *In re Catapult Entm't, Inc.*, 165 F.3d at 750. "The existence of the Nondebtor Provisions makes it plausible that Congress meant what it said in the Statute … [and] if it is plausible that Congress intended the result compelled by the Plain Meaning Rule, we must reject an assertion that such an application is absurd." *In re Sunterra Corp.*, 361 F.3d at 268; *see also Sigmon Coal Co., Inc. v. Apfel*, 226 F.3d 291, 308 (4th Cir. 2000) (holding statute not absurd because, although literal application of statute produced somewhat anomalous result, plausible explanation existed).

Even if application of the Hypothetical Test subordinates bankruptcy policy to intellectual property laws, the appeal of the Actual Test does not allow this Court to adopt such an interpretation "without trespassing on a function reserved for the legislative branch." *Sigmon Coal Co., Inc.*, 226 F.3d at 308. This Court has previously proclaimed:

> In any event, we do not sit to assess the relative merits of different approaches to various bankruptcy problems. It suffices that the natural reading of the text produces the result we announce. Achieving a better policy outcome–if what petitioner urges is that–is a task for Congress, not the Courts.

Hartford Underwriters Ins. Co., 530 U.S. at 13.

Interpretation of the statute is simple. Congress has literally provided the words, coherently strung together, in an effort to provide a plain application of the law. "The trustee may not assume *or* assign any executory contract … if applicable law excuses a party … from accepting performance or rendering performance to an entity other than the debtor or the debtor in possession … and such party does not consent to such assumption or assignment." 11 U.S.C. § 365(c)(1) (emphasis added). The statute plainly says "or." Congress' selection of the word "or" is meaningful and plainly apparent. If a debtor cannot assign a contract under applicable non-bankruptcy law, then it cannot assume it either. A debtor's decision to assign is irrelevant under the plain meaning of the statute. And as this Court has repeatedly instructed, if the statute can be read plainly, no additional inquiries are necessary. As decided by a majority of the circuits asked this question, the plain meaning of the statute conclusively supports the Hypothetical Test.

C. Application of the plain meaning of the statute gives credence to intellectual property law and its federal protections in the face of bankruptcy proceedings.

The plain meaning of section 365(n) recognizes the importance of the nondebtor's patent rights—"rights that should be placed at the forefront as a protective measure against the debtor-friendly broad power of free transferability." Ying, *supra*, at 1281. Thus, this Court can further justify the plain meaning interpretation, although unnecessary, by simply considering the competing interests of federal patent law in addition to the general goals of bankruptcy. *Id.* The purpose of these federal patent law protections is well grounded, dating all the way back to the birth of our nation. U.S. Const. art I, § 8, cl. 8. These constitutionally recognized policy interests cannot be minimized or mitigated just because other policy goals exist.

The United States Constitution protects inventors and intellectual property creators, declaring "Congress shall have the power … To promote the progress of … useful arts, by securing for limited times to … inventors the exclusive right to their … discoveries." *Id.* "The federal patent

system thus embodies a carefully crafted bargain for encouraging the creation and disclosure of new, useful, and nonobvious advances in technology and design" by granting the inventor the desirable "exclusive right to practice the invention for a period of years." *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 150–51 (1989). This Court further stated, "The attractiveness of such a bargain, and its effectiveness in inducing creative effort and disclosure of the results of that effort, depend almost entirely on a backdrop of free competition in the exploitation of unpatented designs and innovations." *Id.* at 151.

Such exclusive protections are more important today than ever as the economic climate shifts from an industrial-based economy to a knowledge-based economy.[7] Because of the evolution of the market, it is imperative intellectual property creators can avoid exploitation and restrict the use of their products according to their terms. With the directive of the Founding Fathers in mind, Congress has sought to further the societal advancement of knowledge by rewarding innovators with a period of exclusive use in exchange for disclosure of their creation. One way an inventor, such as Under My Thumb, can exercise its exclusive right is through licensing, thereby controlling the use of its patent.

1. Federal law illustrates an equally important fundamental policy of providing exclusive protections to patent holders and licensors.

Federal law contains the long-standing rule that a non-exclusive licensee of a patent has only a personal interest in the patent—not a property interest. *In re CFLC, Inc.*, 89 F.3d at 679–80 (citing *Troy Iron & Nail Factory v. Corning*, 55 U.S. 193 (1852); *Oliver v. Rumford Chem. Works*,

[7] For further discussion, *see* Colleen Spring Zimmerman, *Overview: Intellectual Property – the New Global Currency*, 1 Intellectual Property in the Global Marketplace 0.1-0.40 (Melvin Simensky et al. eds., 2d ed. 1999).

109 U.S. 75 (1883); *Hapgood v. Hewitt*, 119 U.S. 226 (1886)).[8] Such a personal right to control one's property cannot be assigned absent the patent holder's consent. *Id.* Thus, federal law entitles a patent holder, or licensor, to maintain complete control over the identity of its licensee.

If the contrary were true, and federal law allowed free assignability, the fundamental purpose of the protections for patent holders and licensors would be eviscerated because a competitor or party seeking use of the invention could either seek a license from the rightful patent holder *or* from an existing licensee of the patent holder or licensor. *Id.* at 679. Frankly, every licensee could become a potential competitor with the licensor, disincentivizing inventors and stunting both social and technological advancements. *Id.*

In the case at hand, the Debtor seeks to blatantly undermine the purpose of these federal protections by allowing a competitor to cloak itself in the protections of federal bankruptcy law and subordinate its exclusive right to control the patent to a successful reorganization. Such a wholesale disregard for the licensor's protections, as reserved by the founders of the Constitution, is a gross deviation from the words and shelter provided in section 365. Under My Thumb's constitutionally grounded right to exclusivity should be protected.

2. Under My Thumb can exercise its exclusive right by licensing its patent to select licensees, thereby controlling the use of its patent.

A licensor's primary benefit of controlling parties privy to the license is the ability to *exclude* certain parties, even more so than the ability to *include* certain parties. *See In re CFLC, Inc.*, 89 F.3d at 679. Under My Thumb is entitled to such privileges. The Hypothetical Test affords a non-debtor licensor these protections by empowering the licensor to prevent a debtor from

[8] "The parties stipulated that the Agreement was non-assignable because, under applicable non-bankruptcy law, Under My Thumb was excused from rendering performance to an entity other than Development and its affiliates." R. at 8, n.7.

transferring the license to any party—especially a direct competitor—through the use of a leveraged buyout and subsequently suspicious plan funding.

Pre-petition, Under My Thumb established a licensing agreement (the "Agreement") with Tumbling Dice Development, LLC ("Development"), a subsidiary of Tumbling Dice, Inc. ("TDI"). R. at 4. Since the Agreement was signed, TDI has been acquired by Start Me Up, Inc. via a leveraged buyout and filed for bankruptcy. R. at 6. Now, post-petition, the Debtor is seeking financing for its Chapter 11 plan from Start Me Up, Inc. and Sympathy for the Devil for $31 million and $35 million respectively. R. at 7. Consequently, Sympathy for the Devil will gain a 51% majority interest in reorganized TDI. R. at 8. Unfortunately for Under My Thumb, Sympathy for the Devil includes a "direct competitor of Under My Thumb who ha[s], for several years, tried to replicate the [patent] Software" within its portfolio of companies. R. at 8. Surely, Under My Thumb would never grant a license to a direct competitor voluntarily, pursuant to its federally protected exclusive right of control. Why, then, should Under My Thumb be subjected to such a crass involuntary consequence simply because a struggling licensee elects to file bankruptcy, obtain financing, and cede control to a direct competitor? It should not.

Any interpretation that ignores the plain language of section 365(c) leaves a non-debtor patent licensor powerless to protect its exclusive rights when a licensee files bankruptcy. Under such errant interpretations, Under My Thumb's license would be transferred to an entity with different liabilities, governing bylaws, capital structure, directors, officers, key employees, and ownership than the debtor with which Under My Thumb contracted. Put plainly, Under My Thumb "would lose the very important ability to control the *identity* of its licensees." *In re CFLC, Inc.*, 89 F.3d at 679. And, as a consequence, it "might spell the end to paid-up licenses such as the one involved in this case." *Id.*

3. Section 365(n) further evidences Congress' desire to protect non-debtor parties in a bankruptcy proceeding.

Further evidence of the need to apply the plain language of section 365(c)(1) is couched in Congress' response to the Fourth Circuit's decision in *Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc*.. 756 F.2d 1043 (4th Cir. 1985). In *Lubrizol*, a debtor-licensor rejected its executory contract with the licensee. *Id.* at 1045. As a result, the world of intellectual property licensing changed by putting non-debtor licensees at high risk of losing their licenses upon a licensor's bankruptcy. In turn, the intellectual property community lobbied Congress to protect licensees facing possible rejection by a bankrupt licensor.

Congress added section 365(n) of the Bankruptcy Code in response to the unfair playing field created by the Fourth Circuit's decision in *Lubrizol*. Madlyn Gleich Primoff & Erica G. Weinberger, Article, *E-Commerce and Dot-Com Bankruptcies: Assumption, Assignment and Rejection of Executory Contracts, Including Intellectual Property Agreements and Related Issues Under Section 365(c), 365(e) and 365(n) of the Bankruptcy Code,* 8 Am. Bankr. Inst. L. Rev. 307, 338 (2000). The new provision "was designed to strike an equitable balance between protecting the interests of the non-debtor licensee with regard to continued use of the intellectual property and permitting the debtor-licensor to avoid affirmative obligations that burden its bankruptcy estate." *Id.* Section 365(n) provides a non-debtor intellectual property licensee two options: (1) treat the license as terminated and become a general unsecured creditor with a claim under 365(g) and 502(g), or (2) elect to retain its rights under the rejected license. 11 U.S.C. § 365(n). Therefore, just as Congress carved out specific non-debtor protections in 365(c)(1), section 365(n) provides additional protections.

For the reasons stated, this Court should adopt the Hypothetical Test as explicitly dictated by Congress. "Or" means "or," not "and." The Debtors are precluded from assigning the Agreement

under applicable law. According to the statute, it necessarily follows that they may not assume the contract either. The Legislature has spoken making this Court's task simple—apply the words as written and end the inquiry. Simply as further justification, application of the Hypothetical Test makes sense because it balances the rights of a debtor and its creditors. Intellectual property creators and creditor licensors depend on the right to exclusivity, a right enabled by the Constitution. The Hypothetical Test accounts for each of these considerations, providing an equitable solution as contemplated by section 365 of the Bankruptcy Code. This Court should affirm the decision of the Thirteenth Circuit and formally adopt the Hypothetical Test.

II. THE THIRTEENTH CIRCUIT CORRECTLY ADOPTED THE *PER DEBTOR* INTERPRETATION OF 11 U.S.C. § 1129(A)(10), WHICH REQUIRES AT LEAST ONE IMPAIRED CLASS OF CLAIMS OF EACH DEBTOR TO ACCEPT A JOINT PLAN FOR REORGANIZATION.

In Chapter 11 proceedings involving numerous creditors and debtors, a joint plan can be used to expedite reorganization so long as the plan passes muster. Confirmation of a plan occurs only if all sixteen requirements of section 1129(a) are met. However, there exists a split among courts as to whether section 1129(a)(10) requires approval from an impaired class of claims *per debtor*, or merely *per plan*. By relying on the plain language of the statute and sound public policy rationales, the Thirteenth Circuit Court of Appeals correctly adopted the *per debtor* interpretation.

A. The plain language of section 1129(a)(10) compels this Court to adopt the *per debtor* interpretation of the statute.

Canons of construction are simply rules of thumb that help courts determine the meaning of statutory verbiage. *Conn. Nat'l Bank v. Germain*¸ 503 U.S. 249, 253 (1992). A court should always turn first to the cardinal canon—the Plain Meaning Rule—before all others. *Id.* This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Id.* at 253–54. The plain language of section

1129(a)(10) directly supports requiring approval from at least one impaired class of claims of *each debtor*.

Section 1129(a)(10) states:

> (a) The court shall confirm a plan only if all of the following requirements are met:
>
> (10) If a class of claims is impaired under the plan, *at least one class of claims that is impaired under the plan has accepted the plan*, determined without including any acceptance of the plan by any insider.

11 U.S.C. § 1129(a)(10) (emphasis added).

Specifically, because the Bankruptcy Code construes singular terms to include the plural form, the plain language of section 1129(a)(10) necessitates a *per debtor* interpretation. Furthermore, a reading of section 1129(a) as a whole reinforces the need for such an interpretation.

1. The plain language of section 1129(a)(10) supports the *per debtor* approach because under the Bankruptcy Code, "the singular includes the plural."

Section 102(7) of the Bankruptcy Code states, "the singular includes the plural." 11 U.S.C. § 102(7). Accordingly, section 1129(a)(10) may be logically read as, "The court shall confirm *plans* only if… at least one class of claims that is impaired under the *plans* has accepted the *plans*." This reading is particularly noteworthy in the context of joint administration, which is often misunderstood and erroneously considered to involve only a single plan of reorganization.

Because Chapter 11 proceedings regularly involve complex multi-debtor situations, parties frequently prefer to simplify the reorganization process through joint administration. *See Reider v. FDIC (In re Reider)*, 31 F.3d 1102, 1109 (11th Cir.1994). Joint administration entails multiple debtors working towards a joint plan for reorganization. *See id.* But "joint plan" is somewhat of a misnomer because joint administration, in reality, still involves multiple plans. *See In re Tribune Co.*, 464 B.R. 126, 181 (Bankr. D. Del. 2011). A joint plan is actually multiple plans, one for each

debtor, joined together in a single docket for the sole purpose of facilitating procedural and administrative efficiency. Fed. R. Bankr. P. 1015 Advisory Committee Note 10 (citing *In re Steury,* 94 B.R. 553 (Bankr. N.D. Ind. 1988)).

When viewed in this light, joint administration still closely parallels bankruptcy proceedings in which plans for each debtor are separately administered. The sole difference is the management of the docket. *See In re Toland*, 346 B.R. 444, 449 (Bankr. N.D. Ohio 2006). Whether the plans are separately or jointly managed does not change the fact that multiple different reorganization plans still exist. *Id.* The *per debtor* interpretation of the statute is consistent with this understanding of joint administration because, irrespective of the chosen management structure, each debtor must still ensure that its plan meets all of the requirements of section 1129(a). The *per plan* approach, on the other hand, is a perversion of the *per debtor* approach, resulting from the mistaken view that joint administration only involves a single plan. R. at 20. Consequently, the *per plan* approach does not comport with the plural reading of section 1129(a)(10).

Despite this reasoning, some courts have held that the plural reading of the statute is consistent with the *per plan* approach. *E.g.*, *JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props., Inc. (In re Transwest Resort Props., Inc.)*, 881 F.3d 724, 730 (9th Cir. 2018). However, such holdings frustrate the primary purpose of section 1129(a)(10). In a recent case, the Third Circuit Court of Appeals stated:

> The purpose of § 1129(a)(10) is to provide some indicia of support for a plan of reorganization *by affected creditors* and prevent confirmation where such support is lacking. . . As such, § 1129(a)(10) requires that a plan of reorganization *pass muster in the opinion of creditors whose rights to repayment from the debtor are implicated by the reorganization*.

In re Combustion Eng'g, Inc., 391 F.3d 190, 243–44 (3d Cir. 2004), as amended (Feb. 23, 2005) (internal quotations omitted) (emphasis added).

Whether a class of claims is impaired by a particular plan depends upon how the plan affects the creditors' rights. 11 U.S.C. § 1124. A class is impaired when the creditor's pre-bankruptcy rights are altered under a debtor's plan for reorganization. *Id.* This implies that a class is only considered impaired because of the class's relationship to a particular debtor's estate. *See id.* The *per debtor* approach fulfills the purpose stated by the Third Circuit by remaining mindful that creditors' rights are implicated by the reorganization of *each debtor's* estate. *In re Combustion Eng'g, Inc.*, 391 at 243–44.

The mere fact that section 1129(a)(10) refers to "plan" in the singular is an insufficient basis to approve the *per plan* approach. The Legislature intentionally included "the singular includes the plural" as a general rule so that it would apply to the entire Bankruptcy Code. 11 U.S.C. § 102(7). One purpose of including this rule of construction is to avoid cluttering the statute with redundant phrases such as "the plan and/or plans." *See* 2013 Bill Text MD H.B. 472, Part 1 of 3 (Revisor's Notes on Subtitle 5); *see also* 1997 Bill Text MD H.B. 11 (Revisor's Note, "In subsection (a) of this section, the second sentence of former Art. 48A, Section 240C(a), which provided that "reason" is defined to include "reasons", is unnecessary in light of Art. 1, Section 8 of the Code, which provides that the singular includes the plural."). But more importantly, Congress clearly built in this rule of construction to avoid the type of wordplay upon which the *per plan* interpretation is founded. *See* H.R. Rep. No. 95-595 (1977) (reprinted in 1978 U.S.C.C.A.N. 5963; S. Rep. No. 95-989 (1978), reprinted in 1978 U.S.C.C.A.N. 5787). The *per debtor* interpretation is the only reasonable interpretation under the plural readings of section 1129(a)(10) and is equally supported by the singular reading when applied in the context of substantive consolidation.

2. <u>When read as a whole, the plain language of section 1129(a) of the Bankruptcy Code supports the adoption of the *per debtor* approach.</u>

A reading of section 1129(a) as a whole bolsters the *per debtor* approach to plan approval. "[A] statute is to be read as a whole...since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (internal citations omitted). Section 1129(a) outlines plan requirements, which impose obligations of good faith and disclosure upon the plan's proponents. *E.g.*, 11 U.S.C. § § 1129(a)(3) and (5).

All of these requirements apply equally to each debtor regardless of whether there is only one plan or multiple. To emphasize this point, scholars have noted:

> For example, if there are fifteen entities, it obviates the need to file the same motion fifteen times. But it does not abridge legal requirements. Few would question that, if fifteen affiliated entities in fifteen separately administered chapter 11 cases pursue cram-up, they would have to satisfy the cram-up requirements independently.

Michael Chaisanguanthum, *Charter: The Most Important Recent Bankruptcy Decision for Secured Creditors*, 27 Emory Bankr. Dev. J. 9, 18 (2010).

Additionally, several of the other requirements under section 1129(a) clearly illustrate why the *per debtor* approach is the logical interpretation of the statute. For example, subsection 1129(a)(1) states:

> (a) The court shall confirm a plan only if all of the following requirements are met:
>
> (1) The plan complies with the applicable provisions of this title [11 U.S.C. §§ 101 et seq.].

11 U.S.C. § 1129(a)(1).

When read to include the plural, this section requires that "[t]he plans comply with the applicable provisions of this title." *Id.* Stated another way, every plan submitted by a debtor must comply with the Bankruptcy Code. Therefore, each debtor, through its plan, must comply with the

Bankruptcy Code for this requirement to be met. Chaisanguanthum, *supra*, at 18. The *per debtor* interpretation calls for this exact result. Contrastingly, by allowing a single debtor to avoid complying with the Bankruptcy Code merely because another debtor's plan complies, the *per plan* interpretation produces an absurd result. *In re Tribune Co.*, 464 B.R. at 183.

Moreover, subsection 3 states, "The plan has been proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). Once again, the *per plan* approach contradicts society's common sense of morality and fairness by producing an absurd result. In the context of joint administration, a debtor could submit a bad-faith reorganization plan to the joint plan so long as any other debtor's plan was submitted in good faith. *In re Tribune Co.*, 464 B.R. at 183. Contrastingly, the *per debtor* interpretation inherently requires each and every debtor to act in good faith when submitting a reorganization plan governing its individual estate, even when that plan is ultimately included in a joint plan. *Id.*

As the record shows, Under My Thumb would be disproportionately harmed by the proposed joint plan. R. at 7–8. It seems doubtful that the plan governing Development's estate was proposed in good faith since the plan gives a direct competitor of Under My Thumb access to Under My Thumb's intellectual property. R. at 7–8. Equity, the foundation of bankruptcy law, should not allow Development to impose a bad-faith plan on its creditors just because other debtors have acted in good faith.

Section 1129(a), as a whole, was enacted to protect creditor's rights by requiring every single debtor to obtain support for plans that impact its creditors' rights. *In re Combustion Eng'g, Inc.*, 391 F.3d at 243–44, as amended (Feb. 23, 2005) (internal quotations omitted). This purpose and the other sections of the statute provide the essential context that supports the *per debtor* interpretation of section 1129(a)(10).

B. The *per debtor* interpretation of section 1129(a)(10) serves the public policy goals of Chapter 11.

Chapter 11 aims to strike a balance between the economic desirability of continued business and the preservation of creditor's rights to the furthest extent possible. The *per debtor* approach protects creditor safeguards granted under Chapter 11 and resolves public policy concerns presented by the *per plan* interpretation. The *per plan* approach would slam the scales down in favor of plan-proponents by popularizing de facto substantive consolidation and encouraging debtor gamesmanship.

1. The *per debtor* approach preserves the distinction between joint administration and substantive consolidation, thereby preventing de facto consolidation.

Generally, bankruptcy proceedings only allow a debtor to reorganize its own estate. *See In re Tribune Co.*, 464 B.R. at 181. Where multiple debtors create and file separate plans to govern their individual estates, the statute makes clear that each debtor must have at least one impaired class of creditors approve the plan. *See id.* In this type of situation, the number of debtors is equal to the number of discretely filed plans, so the distinction between the *per debtor* and *per plan* approaches disappears. The distinction becomes most important in the contexts of joint administration and substantive consolidation.

Notably, "joint administration does not alter the Bankruptcy Code's requirements in any way--each debtor's estate is still considered separate and distinct" and each creditor's substantive rights remain unaffected. Suzanne T. Brindise, *Note and Comment: Choosing the "Per-Debtor" Approach to Plan Confirmation in Multi-Debtor Chapter 11 Proceedings*, 108 Nw. U.L. Rev. 1355, 1359 (2014). In joint administration, each debtor is still responsible for reorganizing its individual bankruptcy estate. *See In re Tribune Co.*, 464 B.R. at 181–82. Each debtor's plan for reorganization is then included in a single document, the joint plan, to minimize the complexity of

filing and overseeing the plans. *Id.* at 182. These attributes of joint administration are important because they distinguish joint administration from substantive consolidation. *Id.*

Substantive consolidation is an equitable remedy intended to be used sparingly. *See, e.g.*, *Alexander v. Compton (In re Bonham)*, 229 F.3d 750, 767 (9th Cir. 2000). It allows the assets and liabilities of separate entities to be combined and treated as if they were owned by a single entity. *Id*. Although consolidation is advantageous in certain circumstances, it seriously impairs a creditor's rights because creditors are forced to compete with each other over assets that were previously within the reach of fewer creditors.

Because of these repercussions, courts understandably impose rigorous requirements that debtors must meet to qualify for substantive consolidation. *In re Reider*, 31 F.3d at 1109. But the *per plan* approach effectively allows debtors to bypass these strict requirements, producing the concept of de facto substantive consolidation.

De facto substantive consolidation exacerbates the power-discrepancy between creditors and debtors. *In re Knobel*, 167 B.R. 436, 441–42 (Bankr. W.D. Tex. 1994). For example, debtor-friendly plan proponents may take advantage of Chapter 11's provisions to ensure a successful cramdown regardless of whether the plan is disproportionately unfavorable to all other creditors. *See* discussion *infra* Part II.B.3.

Additionally, the *per plan* interpretation of section 1129(a)(10) aggravates a disunity that already exists between bankruptcy law and corporate law. Substantive consolidation conflicts with the corporate law principle that separate legal entities are to be treated separately. *See Skidmore, Owings & Merrill v. Canada Life Assurance Co.*, 907 F.2d 1026, 1027 (10th Cir. 1990).

An exception to this corporate law principle is "piercing the corporate veil," which is utilized only in rare circumstances where multiple entities are so closely related that it warrants

treating them as a single entity. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 475 (2003) (superseded by statute on other grounds); *Schenley Distillers Corp. v. United States*, 326 U.S. 432, 437 (1946); *Burnet v. Clark*, 287 U.S. 410, 415 (1932). Substantive consolidation is an analogous exception used in the bankruptcy context. *See In re Bonham*, 229 F.3d at 767. As such, courts have similarly put strict limitations on the applicability of substantive consolidation to situations in which treating multiple debtors as a single entity by combining their estates is procedurally beneficial and does not unfairly prejudice creditors. *FDIC v. Colonial Realty Co.*, 966 F.2d 57, 61 (2d Cir. 1992).

The *per plan* approach, by facilitating de facto substantive consolidation, allows debtors to exploit the Bankruptcy Code to expand the applicability of substantive consolidation. It turns the exception into the rule. As a result, the *per plan* approach not only promotes gamesmanship and abuse of the Bankruptcy Code, but also intensifies the disharmony that exists with corporate law principles.

2. While drafting Chapter 11, Congress intentionally included substantive rights for creditors to promote meaningful negotiations.

When section 1129(a)(1) was originally added to the code, the section merely required consent from a class of creditors; however, since 1984, this section has required *impaired* creditor consent. Peter E. Meltzer, Article, *Disenfranchising The Dissenting Creditor Through Artificial Classification Or Artificial Impairment.*, 66 Am. Bankr. L.J. 281, 312–13. In addition to the preference against insider votes, the 1984 amendment indicates that, while Congress prefers that the economic interests of a business remain a going concern, this preference does not go so far as to override an impaired creditor's interests in every situation. *Id.*; Brindise, *supra*, at 1364.

The 1984 amendment and various aspects of Chapter 11 indicate a creditor's right to vote is a substantive right. *See, e.g.*, 11 U.S.C. § 1129(a)(5). Furthermore, joint administration does not substantively abridge the code's requirements. Chaisanguanthum, *supra*, at 16. Accordingly,

creditor's rights, particularly voting rights, should remain unaffected by the decision to jointly administer debtors' estates. *See id.*

One court has held that section 1129(a)(10) does not confer substantive rights; however, those cases ignore the policy rationale behind the statute and misclassify section 1129(a)(10) as merely a technical requirement. *E.g.*, *In re Bataa/Kierland, LLC*, 476 B.R. 558, 578 (Bankr. D. Ariz. 2012) ("the court will not inquire into the motives for the alleged manipulation of the votes so long as they are consistent with the party's proper role and capacity in the case"); *In re 7th St. & Beardsley P'ship*, 181 B.R. 426, 431 (Bankr. D. Ariz. 1994). While section 1129(a)(10) is intended to provide some indicia of support from creditors, the need for creditor support, and by extension a creditor's right to be heard, is not merely a formality.

The statutory requirement for creditor approval provides one of the few means by which creditors are able to protect their interest in a debtor's estate. Without meaningful deference to that protection, Chapter 11's objective that the plan be a product of creditor-debtor negotiations becomes a fairytale. Creditors must have the power to protect their interests with their vote. If that vote does not have meaningful impact, then creditors lose their negotiating power and the ability to protect themselves.

The present case provides a perfect example of why it is important for creditors to have a say in how their rights are affected. The Plan disproportionately harms Under My Thumb compared to other creditors, which is the sole reason that Under My Thumb has withheld its approval of the plan. R. at 7–8. Under My Thumb is merely exercising its statutory right to defend its interests in Development's estate. R. at 8. A plan that is considerably more equitable to all impaired classes of creditors could be reached through negotiations. Therefore, it is not the act of

a rogue creditor, but rather the Debtors' unwillingness to amend unfair terms of the Plan, that has halted successful reorganization.

The *per debtor* approach allows creditors like Under My Thumb to attempt to protect their interest in their debtor's estate via negotiation, while the *per plan* approach strips creditors of any meaningful ability to negotiate.

C. The *per debtor* interpretation of section 1129(a)(10) safeguards against debtor gamesmanship, while still fostering the flexibility that Congress intended.

Chapter 11's requirements allow for flexibility to encourage meaningful negotiations between debtors and creditors regarding plans for reorganization. As previously discussed, an ideal reorganization plan is the result of debtor-creditor cooperation, and "if no impaired class accepts the plan, the debtor has failed to negotiate effectively with its creditors in devising a reorganization plan." *In re Polytherm Indus., Inc.*, 33 B.R. 823, 835 (W.D. Wis. 1983). Without sufficient impaired creditor consent, it is inequitable to approve the plan. *See id.*

The concept of cramdowns, therefore, seems inconsistent with this goal. But cramdowns are permitted to ensure a minority of creditors do not inequitably control the plan. *St. Joe Paper Co. v. Atl. Coast Line R. Co.*, 347 U.S. 298, 314 (1954). Prior to the addition of cramdowns to the code, a single dissenting creditor could unilaterally reject a plan by withholding consent. *Id.* The *per plan* approach reintroduces this concern, but in relation to plan approval instead of rejection.

Under the *per plan* approach, a debtor-friendly, impaired creditor can control the reorganization process. Such a creditor could single-handedly approve a plan, thereby robbing other impaired creditors of the chance to vote against the plan. This imbalance of power paves the way to debtor gamesmanship. The *per plan* approach incentivizes debtors to find the one creditor that can be most easily persuaded to vote in favor of a plan that is injurious to all other creditors, encouraging bribery and collusion.

Section 1122 of the Bankruptcy Code creates another means by which debtors can engage in gamesmanship by granting debtors the ability to setup classes of claims. Section 1122 has been interpreted to merely require that claims classified together be substantially similar rather than requiring all substantially similar claims be classified together. Chaisanguanthum, *supra*, at 16. Consequently, debtors can cherry-pick creditors who are favorable to them and put them in a class as long as they have substantially similar claims. *Id.* Meanwhile, creditors that the debtors view as unfavorable are grouped together in another class. *Id.* Thus, as a result of the *per plan* approach, the debtor has ensured adoption of the plan.

That is exactly what occurred in this case. Under My Thumb, the creditor that will inordinately suffer under the Plan, was placed into a class of claims separate from other debtors. R. at 8. Because the Plan is relatively favorable to other impaired classes of claims, those classes voted in favor of the plan, threatening to force its terms upon Under My thumb. R. at 7–8.

Additionally, although nearly all of the impaired creditors in the present case consented to the proposed plan, the opposite situation is just as likely to arise. If only one debtor-friendly creditor approves the joint plan, is it rational to make that single vote bind all other creditors? The *per debtor* approach guarantees that all impaired classes of creditors retain a minimum amount of power to protect their interests and disincentivizes debtor gamesmanship.

CONCLUSION

Creditors are sometimes viewed in a negative light, but the Bankruptcy Code has reserved specific rights and protections for creditors in the bankruptcy process. But the present case perfectly illustrates an example of an innocent creditor attempting to use the statutory protections granted to it by Congress. For the reasons stated, this Court should affirm the decision of the Thirteenth Circuit Court of Appeals.

APPENDIX A

U.S. Const. art I, § 8, cl. 8.

The Congress shall have power to…To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

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11 U.S.C. § 102. Rules of construction

In this title—

…

(7) the singular includes the plural;

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11 U.S.C. § 365. Executory contracts and unexpired leases

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

…

(c) The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if--

(1)(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(B) such party does not consent to such assumption or assignment; or

…

(f)(1) Except as provided in subsections (b) and (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection.

…

(n)(1) If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract may elect--

(A) to treat such contract as terminated by such rejection if such rejection by the trustee amounts to such a breach as would entitle the licensee to treat such contract as terminated by virtue of its own terms, applicable nonbankruptcy law, or an agreement made by the licensee with another entity; or

(B) to retain its rights (including a right to enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy law to specific performance of such contract) under such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law), as such rights existed immediately before the case commenced, for--

(i) the duration of such contract; and

(ii) any period for which such contract may be extended by the licensee as of right under applicable nonbankruptcy law.

(2) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, under such contract--

(A) the trustee shall allow the licensee to exercise such rights;

(B) the licensee shall make all royalty payments due under such contract for the duration of such contract and for any period described in paragraph (1)(B) of this subsection for which the licensee extends such contract; and

(C) the licensee shall be deemed to waive--

(i) any right of setoff it may have with respect to such contract under this title or applicable nonbankruptcy law; and

(ii) any claim allowable under section 503(b) of this title arising from the performance of such contract.

(3) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, then on the written request of the licensee the trustee shall--

(A) to the extent provided in such contract, or any agreement supplementary to such contract, provide to the licensee any intellectual property (including such embodiment) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment) including any right to obtain such intellectual property (or such embodiment) from another entity.

(4) Unless and until the trustee rejects such contract, on the written request of the licensee the trustee shall--

(A) to the extent provided in such contract or any agreement supplementary to such contract--

(i) perform such contract; or

(ii) provide to the licensee such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such

embodiment), including any right to obtain such intellectual property (or such embodiment) from another entity.

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11 U.S.C. § 1129. Confirmation of plan

(a) The court shall confirm a plan only if all of the following requirements are met:

(1) The plan complies with the applicable provisions of this title [11 USCS §§ 101 et seq.].

…

(3) The plan has been proposed in good faith and not by any means forbidden by law.

…

(5)(A)

(i) The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and

(ii) the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy; and

(B) the proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider.

…

(10) If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.